

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 177/08
5121793**

BETWEEN GEOFFREY PETER BLACKMORE
 Applicant

AND GENERAL DISTRIBUTORS LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Susan Hoskin and John Armstrong, Counsel for Applicant
 Stephen Langton and Michael O'Brien, Counsel for
 Respondent

Investigation Meeting: 6 May 2008

Further Information: 8 May 2008
 9 May 2008

Determination: 14 May 2008

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] The applicant Mr Geoffrey Peter Blackmore ("Mr Blackmore") makes application to the Authority for an order for interim reinstatement to his former employment with General Distributors Limited's ("General Distributors") at the Woolworths Browns Bay supermarket. Mr Blackmore was dismissed from his employment as Duty Manager at Woolworths Browns Bay for serious misconduct, as confirmed in advice dated 4 April 2008. The dismissal arises out of a relationship Mr Blackmore formed with a co-worker and whom materially from General Distributor's view, was Mr Blackmore's subordinate. I refer to that other employee in this Determination as "the co-worker".

[2] Mr Blackmore lodged his application in the Authority on 17 April 2008 claiming he was unjustifiably dismissed and seeking remedies including interim reinstatement. As required, he also lodged an undertaking to abide by any order made by the Authority in respect of damages that may be sustained through the granting of

an order for interim reinstatement. However, the application cited his employer as Progressive Enterprises Limited. The statement in reply was lodged on behalf of General Distributors Limited and without opposition, I amended the intituling of the proceeding substituting General Distributors Limited for Progressive Enterprises Limited on the basis that General Distributors was his employer and there was no issue with that. There was no issue taken as to service and General Distributors attended the investigation meeting in respect of Mr Blackmore's application for interim reinstatement.

[3] As a consequence of the amended respondent, the undertaking lodged was defective and so I granted Mr Blackmore leave to amend his undertaking so that it was given in respect of General Distributors Limited. That amended undertaking has now been lodged.

[4] In its statement of reply, General Distributors says Mr Blackmore was justifiably dismissed for serious misconduct, which comprised:-

- a. lying to General Distributors about the true nature of his relationship with a subordinate (Mr Blackmore denied being in a relationship with a 16 year old female Checkout Supervisor and said that they were "just friends" despite being involved in an ongoing sexual relationship with the female employee), and
- b. subsequently encouraging the 16 year old female Checkout Supervisor to resign from General Distributors' employ.

[5] The parties were unable to resolve the differences between them by the use of mediation. There is to be an investigation meeting of the substantive claim from 8-10 July 2008.

[6] I have met with the representatives and considered affidavit evidence from Mr Blackmore, Ms Emma Jane Kyne ("Ms Kyne"), the co-worker, and Mr Peter Lawrence Hartley ("Mr Hartley").

[7] This Determination deals only with what should happen until a full investigation into Mr Blackmore's claim that he was unjustifiably dismissed. It is no more than that and is in no way a final determination or any influence on how his claim of unjustifiable dismissal might eventually be determined.

Interim reinstatement

[8] Applications for interim reinstatement are considered under Section 127 of the *Employment Relations Act 2000* (“the Act”). That section requires the Authority to apply the law relating to interim injunctions and to have regard to the objects of the Act. These objects include supporting productive employment relationships founded on good faith behaviour and mutual trust and confidence as well as the importance of reinstatement as a primary remedy.

[9] The Authority provides, wherever practicable, for reinstatement where this is claimed and a personal grievance is established. The Authority acts to provide a just solution to the parties’ problems in the particular circumstances of each individual case. An order for interim reinstatement may be subject to any conditions that the Authority thinks fit - empowering the Authority to craft pragmatic solutions to do justice in each particular case.

[10] The remedy of reinstatement is interim injunctive relief. An injunction is only available for the protection of a legal right or to prevent the infringement of a legal right and is a discretionary remedy. The established tests for interim reinstatement are these:-

- (i) whether the applicant has an arguable case of unjustified dismissal; and
- (ii) whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the applicant; and
- (iii) the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties’ cases so far as they can be ascertained at this stage).

An arguable case

[11] At this interim phase, I refer only to basic facts because there are disputed facts which are yet to be tested. Where there is dispute, Mr Blackmore is entitled to the benefit of an assumption that he will be able to prove his case when the substantive matter is investigated¹. In an application for interim reinstatement it is neither possible nor appropriate to reach a conclusion on any contested facts. My views hereafter are provisional only in order to decide if Mr Blackmore should be reinstated pending the substantive investigation.

[12] Mr Blackmore's claim that his dismissal was unjustifiable will be determined according to the statutory test of justification set out in section 103A of the Act.

[13] Initially Mr Langton would not concede there was an arguable and preferred to make submissions as to the merits of the contended arguable case. Eventually however, Mr Langton did concede there was an arguable case. That was a responsible and proper concession to make. It is my own view that there is an arguable case for Mr Blackmore that his dismissal was unjustifiable.

[14] The grounds on which Mr Blackmore claims his dismissal was unjustifiable are helpfully summarised in Mr Blackmore's representative's submissions.

[15] It is arguable for Mr Blackmore that it was unfair of General Distributors to find his absence from work on 4 to 6 November 2007 constituted misconduct when it had previously at the time verbally reprimanded Mr Blackmore.

[16] It is arguable for Mr Blackmore that it was unfair of General Distributors to find that he had acted contrary to the conflict of interest policy and further, that such conduct was serious misconduct.

[17] It is arguable for Mr Blackmore that his dismissal was unfair because General Distributors failed to properly put to him an allegation that he had lied to his employer about the true nature of his relationship with a subordinate. It is arguable that General Distributors put an allegation to Mr Blackmore that he had omitted to report his relationship in circumstances where he was obliged to do so, but instead ultimately decided that he had actually lied about the matter to his employer.

¹ *NZ Stevedoring Co Ltd & Ors -v- NZ Waterfront Workers Union* [1990] 3 NZILR 308.

[18] It is arguable for Mr Blackmore that it was unfair of General Distributors to conclude that his communication with the other employee was an incident of the employment relationship and in the particular circumstances, exposed General Distributors to a risk of an employment relationship problem by the other employee.

[19] It is arguable for Mr Blackmore that General Distributors was not contractually entitled to direct Mr Blackmore to transfer to another store without his agreement and therefore it was unfair for General Distributors to insist that he do so. Additionally, whether or not it was contractually entitled to do so, it is arguable for Mr Blackmore that there was an ultimatum presented to him that he transfer and that such action was not reasonable in all the circumstances.

[20] It is arguable for Mr Blackmore that the decision to terminate in all the circumstances was not what a fair and reasonable employer would have done, because there were alternatives available less than dismissal.

[21] There are also issues arising as to the precise terms and conditions of Mr Blackmore's employment. The matter is a material enquiry and will require determination. Other issues turn on this substantive determination including the contractual scope for relocation.

[22] I consider that all the matters outlined above are the most salient arguable grounds for Mr Blackmore. Having read the affidavit evidence I am satisfied that there is a tenable arguable case and I am in agreement that there is an arguable case and together with Mr Langton's concession, I find accordingly.

Balance of convenience

[23] In the exercise of the Authority's discretion I weigh up the inconvenience to General Distributors of having to bear the burden of interim relief before the substantive case is dealt with at investigation meeting against the inconvenience to Mr Blackmore who may have a just case of having to bear the detriment of wrongful or unjustifiable action until the case has been fully investigated. In this context inconvenience means detriment or injury.

[24] It is also considered in terms of how best to regulate the positions of the parties until, after a full investigation meeting by the Authority has been able to take place, the employment relationship problem is finally determined.

[25] Mr Blackmore has about twelve years service with General Distributors and its predecessor(s). His service is submitted as being exemplary with the exception only of “the odd reprimand” for arriving to work late. Mr Blackmore has not obtained alternative employment since his dismissal and has held himself in readiness for reinstatement. He is emphatic in his desire to be reinstated to Woolworths Browns Bay.

[26] Mr Blackmore deposes that he has no means of supporting himself and may have to leave Auckland to move to Napier to live with his parents if he is not reinstated. He says he is not in a fit state to be applying for alternative employment at this time because he says he will have difficulty explaining to prospective employers the situation he now finds himself and the circumstances leading up to it. He says he has had difficulty forming new relationships let alone starting a new employment.

[27] It is submitted for Mr Blackmore that the respondent will not suffer damage to its reputation, public image or integrity to its services if Mr Blackmore is reinstated pending the substantive investigation. It is also submitted that the respondent is a large company and has significant resources that could accommodate Mr Blackmore’s return to Woolworths Browns Bay with minimal disruption.

[28] In answer to General Distributor’s concerns, it is submitted for Mr Blackmore that he is prepared to enter into any reasonable undertakings and to abide by any necessary restrictions to protect the other employee. It is also said that Mr Blackmore is prepared to change his shifts and it is noted that the other employee works only three days per week.

[29] It is submitted that the short duration until the substantive investigation does not weigh heavily in the balance. Principally, it is submitted that Mr Blackmore’s strong wish to work and the financial hardship that will result together with the medical evidence annexed to his affidavit, support an immediate return to work. It is said that these matters override any arguments that General Distributors may suffer any lasting

or serious injustice if the interim reinstatement is permitted and that Mr Blackmore will not be compensated by damages because he has a strong desire to return to his position and his mental health will benefit if he is allowed to return to work.

[30] It is also submitted that there is no appropriate remedy to interim reinstatement in the circumstances of the case because there is a real risk that if Mr Blackmore is not reinstated there will be a significant impact on his ability to reintegrate into the workforce in the future. It is also submitted that the medical professionals' information support Mr Blackmore's return to work as being very important to him and of significant benefit to his mental health. It is said that Mr Blackmore may suffer further relapses in his mental health if he remains unjustifiably banned from the workplace.

[31] General Distributors says it has genuine and reasonably held concerns about the safety of the co-worker if Mr Blackmore is reinstated. These concerns are said to arise out of Mr Blackmore's admitted behaviours in relation to the co-worker. It is also said that Mr Blackmore has shown a history of breaching Court orders because of similar "obsessive" behaviour. General Distributors considers Mr Blackmore poses a real risk to health and safety at its Brown's Bay store and in particular, in relation to the co-worker. It emphasises it is committed to the health and safety of all its employees and it considers it would be compromising those obligations if it were required to have Mr Blackmore working at the Browns Bay store.

[32] The Authority has an affidavit from the co-worker. She deposes that she has a real concern about Mr Blackmore returning to work because he seems to be "obsessed" with her. She says she does not want to be alone with Mr Blackmore in any part of the store with him and that she could not work in the same place as him. She says she would seek to transfer to another store or resign. As she attends school close to her home in Torbay, she could not easily find other work nearby.

[33] General Distributor's concerns are well-founded because they arise directly out of Mr Blackmore's own email correspondence to General Distributor's parent company's human resource specialist Ms Kyne.

[34] I accept General Distributors' concern for its obligations in relation to the health and safety of its employees and specifically in relation to the co-worker is genuine and reasonably held. This is a material factor in the exercise of my discretion.

[35] So too, is the fact that Mr Blackmore has not been at work since he was suspended in November 2007. He has now been away from the workplace for some five months. That is a material factor too.

[36] Material also is that I have arranged to investigate the substantive employment relationship problem on 8 July 2008 and continuing to 10 July 2008. The availability of an early substantive investigation is particularly influential in the exercise of my discretion.

[37] Having regard to all these matters, it seems to me it would bear more harshly on General Distributors to have to bear the burden of injunction by being required to reinstate Mr Blackmore to his position as Duty Manager before the substantive case is heard in a few weeks time when it may successfully defend Mr Blackmore's claim, than it is on Mr Blackmore to be denied it until the substantive Determination, that being only a matter of weeks away now.

[38] In such circumstances, I find therefore that the balance of convenience favours General Distributors.

Overall justice

[39] Matters of detail can overwhelm matters of substance. Standing back from the detail of the other tests I now decide whether it will be in the interests of justice to grant interim reinstatement. I accept the submission that the Authority's discretion is "a matter of broad discretion" and ultimately I must step back and ask where the overall justice lies.

[40] I am particularly mindful of the primacy accorded by Parliament to the remedy of reinstatement as a relevant factor in considering interim reinstatement. That primacy has recently been reaffirmed by the Employment Court where it has said that

section 125 of the Act amounts to Parliament directing that unless reinstatement is impracticable, it must be provided².

[41] It is submitted for Mr Blackmore that he has not since his dismissal behaved inappropriately or posed any risk or threat to the co-worker. It is also submitted that the medical information dispels any suggestion that Mr Blackmore is a threat to health and safety.

[42] However, General Distributors points to Mr Blackmore's public statements criticising it on his webpage blog. These comments it says are derogatory. It also says it has permanently appointed another employee to the position of Duty Manager and if Mr Blackmore were reinstated that other employee would be displaced. It also says that Mr Blackmore has seriously damaged the trust of the store manager Mr Peter Hartley to whom he would report.

[43] While I have said I consider it would bear more harshly on General Distributors in all the prevailing circumstances to be required to reinstate Mr Blackmore at the Browns Bay store, I am mindful of the hardship I am persuaded that Mr Blackmore will suffer. He will be without an income and unable to support himself. He has no readily available funds to call on to sustain himself. The very broad discretion accorded to the Authority and in particular its statutory ability to impose conditions it thinks fit – persuade me that I ought to devise a pragmatic solution.

[44] I identified that Mr Blackmore's application while establishing a convincing case of financial hardship, contemporaneously and inadvertently I suspect, suggested he did not have the means to satisfy the Undertaking as to Damages he had lodged. That situation seemed to me problematic for Mr Blackmore because of this caveat from the Employment Court:-

[38] Unlike in the Authority where it provided none, the plaintiff has now given evidence of its ability to back its undertaking as to damages. That is an essential element of the case of any plaintiff seeking injunctive relief where a consequence of the grant may be the financial loss to the party injected that the plaintiff undertakes to meet if so ordered by the Court. Such information is frequently omitted in cases seen by this Court and applicants for interlocutory

² *Sefo -v- Sealord Shellfish Ltd*, unreported, CC4A/08, 17 April 2008, Colgan CJ at paragraphs [51] and [52]

injunctive relief should be on notice that unless it is provided, relief may be postponed at best and refused at worst.

[45] I declined to accept an undertaking from Mr Blackmore's parents because obviously they are not the applicants asking for injunctive relief. Instead, I advised Mr Blackmore's undertaking was defective in this and the earlier stated respect and that while I would not decline the application on that basis alone, the determination of whether to grant it would be postponed until appropriate evidence of Mr Blackmore's means was provided. It was subsequently and I have also considered a response from General Distributors. I therefore proceeded to deal with the application on its merits. I am satisfied that on the evidence now provided as to Mr Blackmore's assets, that he has the means to meet any undertaking as to damages given by him, as are likely in the relatively short duration of the investigation of his claim now before the Authority.

[46] Notwithstanding my conclusion that the balance of convenience lies with General Distributors, in considering the overall justice of the matter I am inclined to agree that some form of relief is required in terms of best regulating the position of these parties until investigation meeting and Determination. I am moved to that conclusion because I accept Mr Blackmore will suffer very real financial hardship even in the relatively short period before the substantive investigation meeting. But there will also be a short period before the Determination is issued. Balancing the various competing interests, I consider the overall justice favours Mr Blackmore's in terms of the need for some injunctive intervention, as I have said, notwithstanding the balance of convenience does not lie with him if reinstatement means that he return to his duties.

[47] I stand back now and give consideration to crafting an appropriate practical solution, other than those advanced by the parties and which, in equity and good conscience, will meet the justice of the case. I am obliged to give consideration to conditional reinstatement. It seems to me the consideration of conditions can proceed only after a case for reinstatement has been properly made out. That case is made out following my conclusion that the overall justice lies with him. But the intervention shall be conditional having regard to the reasonable concerns held by General Distributors. Those conditions shall be that, Mr Blackmore will not be required to perform his work duties and nor shall General Distributors be required to allow him to

perform those duties; this order is deemed to have effect from the date of termination; and the orders will continue in effect until the Authority's Determination on the substantive matter is issued.

Determination

[48] For all the above reasons, in considering the best way to regulate matters between now and the investigation meeting on 8 July 2008 and determination, I make the following orders:-

(i) On the basis of the undertaking Geoffrey Blackmore has provided, I order that Geoffrey Blackmore be reinstated to his employment;

(ii) Geoffrey Blackmore will not be required to perform his work duties and nor shall General Distributors Limited be required to allow him to perform those duties;

(iii) This order is deemed to have effect from the date of the termination of Geoffrey Blackmore's employment;

(iv) These orders will continue in effect until the Authority's Determination on the substantive matter is issued.

Costs

[49] If costs are sought they are reserved.

Leon Robinson

Member of Employment Relations Authority